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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 737

CITIZEN BAND OF POTAWATOMI INDIANS OF OKLAHOMA, ET AL., THE PRAIRIE BAND OF THE POTAWATOMIE NATION OF INDIANS, ET AL., *Petitioners,*

v.

THE UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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The petitioners, Citizen Band of Potawatomi Indians of Oklahoma, et al., and the Prairie Band of the Potawatomie Nation of Indians, et al., appellants below, petition for a writ of certiorari to the United States Court of Claims, to review the judgment of that Court entered in this case April 14, 1967.

OPINIONS BELOW

The opinion of the Court of Claims is not yet reported (Appendix A, infra, 1a). The opinion of the Indian Claims Commission pertaining to the question presented by this petition is reported at 11 Ind. Cl. Comm. 693, 705-710 (Appendix B, *infra,* 23a).

JURISDICTION

The judgment of the Court of Claims was entered April 14, 1967. A motion to amend the judgment (by petitioners who were appellants below) was denied July 20, 1967. A motion for reconsideration (by ~~petitioners who were~~ interveners below) was denied October 13, 1967. Jurisdiction of this Court is invoked under Section 20(c) of the Indian Claims Commission Act, 60 Stat. 1049, 25 U. S. C. § 70s(c) and 28 U. S. C. § 1255.

STATUTES AND TREATIES INVOLVED

Pertinent provisions of the Indian Claims Commission Act, 60 Stat. 1049, 25 U. S. C. 70, and of the treaties of August 24, 1816, 7 Stat. 146, and July 29, 1829, 7 Stat. 320, are printed, Appendix C, *infra,* 29a-31a.

QUESTION PRESENTED

The Court of Claims having determined that an Indian treaty authorized the United States to reserve out of Indian lands "a large contiguous tract or tracts," but did not authorize the President "to pick and choose mineral lands, whenever and wherever located;" and that the issuance by agents of the Government of permits and leases for numerous scattered mineral locations to non-Indians was "an abuse of the discretion

reserved in the treaty;" may that Court nevertheless (in its own words) "allow it [the United States] the benefit of its actual selections, even though not properly made" and thereby deny an Indian tribe recovery for such lands under the Indian Claims Commission Act?

STATEMENT OF CASE

Petitioners brought suit under the Indian Claims Commission Act alleging that lands (of their forebears or predecessors) were ceded to the United States for an unconscionable consideration by the treaty of July 29, 1829, 7 Stat. 320. Indian title to the area with which this petition is concerned was held under the earlier treaty of August 14, 1816, 7 Stat. 146. The 1816 treaty effected a settlement of a disputed land claim by a division of the land in dispute between the parties: the Indians relinquished to the United States their claim to one part, while the United States relinquished to the Indians "all the land" in the other part "except . . . such other tracts, on or near to the Ouisconsing and Mississippi rivers, as the president of the United States may think proper to reserve: *Provided,* That such other tracts shall not in the whole exceed the quantity that would be contained in five leagues square."

Within the area relinquished to the Indians (located in northern Illinois and southern Wisconsin, then Illinois Territory) there were known to be deposits of lead. Commencing in 1822, under the purported authority of the reservation above quoted, Army Ordnance officers in charge of lead mines in the public domain permitted prospectors to explore the mineral area and to apply for mineral leases or mining permits. Under this procedure leases were issued for 160-acre

and 320-acre tracts and permits for ten-acre tracts. While it is now plain that the lead deposits were contained within areas totalling considerably less than five leagues square (15 miles square or 144,000 acres), these were scattered over an area of perhaps 2,000 square miles or more than a million acres, and could not be embraced within a few compact areas (Appendix A, *infra,* 5a-6a).

In 1828 the officer in direct charge of the mining operations recommended that no tract be laid out or defined under the reservation clause because "it would operate very much to cramp the enterprise of the miners, to confine them to a small surface, when *searching* for mines . . ." (Record, Appendix to Appellants' Brief, p. 198. Emphasis in original.) As a result, "the whole area, many times five leagues square, was being cut up and made useless to the Indian way of life." (Appendix A, infra, 6a). In May 1829 the administrative head of the program stated that of the five leagues square only 640 acres had been formally reserved (the townsite of Galena, Illinois), and in his view the leases were temporary arrangements, not reserves which committed the Government under the reservation clause, since "the principal object of present operations is but preparatory to an advantageous final arrangement." (Record, Appendix to Appellants' Brief, p. 214).

By the Treaty of July 29, 1829, the mineral area as well as an additional area was ceded to the United States for an average consideration of about 10 cents per acre (3,528,949 acres for $364,901). In their suit petitioners contended that the mineral-bearing lands had not been reserved by the United States in accordance with the treaty and that the minerals should be included in determining the value (as of 1829) of the

lands in suit. The Indian Claims Commission held that under the reservation clause the United States had reserved 144,000 acres, including all the mineral areas. Finding that the land (exclusive of mineral lands) had an average value of 70 cents per acre, and that the consideration paid was unconscionable, the Commission made an award of $2,094,573.02, representing the difference, less certain offsets (Record, Appendix to Appellants' Brief, pp. 2, 2c).

On petitioners' appeal the Court of Claims affirmed in part and reversed in part.

The Court held that as a matter of law the Commission had erred in its construction of the reservation clause of the 1816 treaty, and the Court endorsed the statement of the official in charge of Indian Affairs in 1827, that "nothing can be more incorrect than a construction which gives the right of location in tracts of one or two hundred acres over the whole country . . . *It would render the whole country utterly useless to the Indians* . . ." (Emphasis the Court's). In the Court's view, the reservation clause contemplated that the President "would select a large, contiguous tract (or tracts), without awaiting full mineral exploration," and so far as officials acted on the view "that the selection might be accomplished *pro tanto* by mineral locations, permits and leases of from ten to 320 acres," their actions comprised "an abuse of the discretion reserved in the treaty." The Court ruled expressly that "the Commission erred in finding that the President could pick and choose mineral lands, whenever and wherever located, so as to have such acreage include all the lead lands . . . up to the specified maximum" (Appendix A, *infra,* 8a, 12a, 14a, 20a).

However, in remanding the case for a revaluation of the lands the Court instructed the Indian Claims

Commission to deduct the fair market value of the lands "selected by the United States . . . by the granting of mining leases and permits . . ." (Appendix A, *infra,* 20a-21a).

Under this decision the petitioners are held entitled to recover the market value only of mineral lands, if any, which were not the subject of leases or permits. (Under the Commission's decision the petitioners were held not entitled to recover any mineral values.)

The Court concluded its opinion on this issue with the comment (Appendix A, *infra,* 21a):

> We may suppose that the United States might have done better for itself than this if it had made a timely selection of its 144,000 acres, including mineral lands, in a proper manner, but to reconstruct such a hypothetical selection now would involve guesswork and be purely speculative. The United States must bear the consequences of the improper and dilatory way it went about the selection. Our method, however, does allow it the benefit of its actual selections, even though not properly made. . . .

REASONS FOR GRANTING THE WRIT

The decision of the Court of Claims raises questions about the standards by which the actions of the United States should be judged and its responsibilities to its Indian wards measured under the Indian Claims Commission Act, questions of importance never settled by this Court. The Court of Claims is vested with exclusive appellate jurisdiction over the Indian Claims Commission, subject only to review at the discretion of this Court. We submit that the Court should exercise that discretion in this case.

As the Court of Claims construed the treaty provision in question (we think correctly) it did not reserve to the United States the mineral lands, it did not authorize small, scattered reservations by leases and mining permits, it did not give the President the right "to pick and choose." The Court regarded the behavior of officials of the United States as violative of the Indians' rights. Accordingly, the Court declared: "The United States must bear the consequences of the improper and dilatory way it went about the selections" (Appendix A, *infra,* 21a).

Nevertheless, the Court's mandate to the Indian Claims Commission effectively relieves the Government of any consequences. Damages are to be assessed as though the United States acquired valid rights and extinguished Indian rights, even though its selections of land were improperly made, involved an abuse of discretion, and were based upon an erroneous construction of the treaty. In its mandate to the Commission the Court allows the United States the fruits of its improper behavior. The Court's inconsistency is acknowledged in its opinion (Appendix A, infra, 21a):

> Our method, however, does allow it the benefit of its actual selections, even though not properly made.

If the Court's opinion is otherwise correct (and we believe it is), its mandate, we submit, is incorrect. The Court appears to have fallen into the error which it attributes to the United States (Appendix A, *infra,* 7a):

> It takes a wrong done to a treaty partner and makes it the basis of a finding of right, though never acquiesced in . . .

CONCLUSION

For the foregoing reasons, petitioners respectfully submit that the writ of certiorari should be granted.

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